

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Writ Petition No.44908 of 2016

Between

M/s. Transocean Offshore,
International Ventures Limited,
(A Company incorporated in Cayman Islands),
Having its Project Office at Transocean House,
Hiranandani Business Park, Powai,
Mumbai-400 076, Rep. by its Constituted Attorney,
Ms. Rajashree Apte, Aged about 35 years,
W/o. Sh. Shailesh Ramesh Apte,
R/o. 8, Krishna Kuti, Station Road,
Govandi E, Mumbai-400 088

... Petitioner

and

1. Union of India, Rep. by its Secretary,
Department of Revenue,
Ministry of Finance, New Delhi;
and 3 others

... Respondents

DATE OF JUDGMENT PRONOUNCED: 06-4-2017

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

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| 1 | Whether Reporters of Local newspapers
may be allowed to see the Judgments? | Yes/No |
| 2 | Whether the copies of judgment may be
marked to Law Reports/Journals | Yes/No |
| 3 | Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? | Yes/No |

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

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... Petitioner

Vs.

\$ 1. Union of India, Rep. by its Secretary,
Department of Revenue,
Ministry of Finance, New Delhi; and 3 others

... Respondents

! Counsel for the Petitioner : Mr. S.Ravi, Senior Counsel

For Respondents 2 and 3 : Advocate General,
State of Andhra Pradesh

For Respondents 1 and 4 : Mr. B.Narayana Reddy,
Assistant Solicitor General

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> Head Note:

? Cases referred:

1. (2002) 3 SCC 314
2. (2006) 3 SCC 1
3. [2009] 25 VST 653
4. [2015] 51 GST 582

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
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Delivered on : 06-4-2017

Coram :

Honourable Mr. Justice V.RAMASUBRAMANIAN
and
Honourable Ms. Justice J.UMA DEVI

W.P.No.44908 of 2016

M/s. Transocean Offshore,
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(A Company incorporated in Cayman Islands),
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... Petitioner

Vs.

1. Union of India, Rep. by its Secretary,
Department of Revenue,
Ministry of Finance, New Delhi
2. State of A.P., Rep. by its Secretary,
Revenue (C.T), Secretariat,
Velagapudi, Guntur District, A.P.
3. Assistant Commissioner-VI, Enforcement Wing,
Office of Commissioner of Commercial Taxes,
Andhra Pradesh, Edupugallu, Vijayawada
4. Assistant Commissioner of Service Tax,
Division VI, Wagle Industrial Estate,
Thane West, Maharashtra-400 064

... Respondents

For the Petitioner : Mr. S.Ravi, Senior Counsel

For Respondents 2 and 3 : Advocate General,
State of Andhra Pradesh

For Respondents 1 and 4 : Mr. B.Narayana Reddy,
Assistant Solicitor General

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

Writ Petition No.44908 of 2016

Order: (per V. Ramasubramanian, J.)

The petitioner has come up with the above writ petition challenging an order of assessment passed by the 3rd respondent herein under the Andhra Pradesh Value Added Tax Act, 2005 for various tax periods in the years 2012-13 and 2013-14.

2. Heard Mr. S.Ravi, learned Senior Counsel for the petitioner, learned Advocate General for the State of Andhra Pradesh appearing for the respondents 2 and 3, and Mr. B.Narayana Reddy, learned Assistant Solicitor General of India for the respondents 1 and 4.

3. The petitioner is engaged in the business of carrying on offshore drilling operations for petroleum exploration and production company. The petitioner was awarded various contracts by the contractor of the Oil and Natural Gas Corporation Limited (ONGC), for carrying out offshore drilling activities. According to the petitioner, these contracts were entered into at Mumbai on various dates.

4. For the purpose of carrying out the due execution of the contracts, the petitioner imported various drilling rigs. These rigs were mobilised both at the east-coast and west-coast. It is claimed by the petitioner that these rigs were used exclusively in the western coast for drilling operations.

5. However, the petitioner set up a temporary base at Kakinada in Andhra Pradesh, purportedly for logistical purposes, in order to enable them to carry out maintenance of the rigs. This base at Kakinada was also used for temporarily storing the equipment as well as spares.

6. To avoid any dispute with regard to the movement of the rigs along the borders of the State of Andhra Pradesh, the petitioner also registered itself as a dealer under the A.P. VAT Act, 2005 and obtained a TIN number.

7. Pursuant to an authorisation issued on 07-01-2015 by the Joint Commissioner (Enforcement), the 3rd respondent conducted an audit of the books of accounts of the petitioner for the period 2012-13 to 2013-14. Thereafter, a show cause notice dated 09-01-2015 was issued in Form VAT 305A, proposing to levy tax on operator hire charges on the rigs of the petitioner at the rate of 14.5% under Section 4(8) of the A.P. VAT Act, 2005, on the ground that there was a transfer of the right to use.

8. The show cause notice was challenged by the petitioner before this Court in W.P.No.1778 of 2015. But by an order dated 03-02-2015, this Court disposed of the writ petition with liberty to the petitioner to file objections and a direction to the 3rd respondent to pass orders after examining the objections with regard to jurisdiction and competence of the tax authority of the State of Andhra Pradesh.

9. Accordingly, the petitioner filed a detailed reply dated 17-3-2015, objecting to the very jurisdiction of the 3rd respondent to levy tax. The petitioner also requested the 3rd respondent to decide the question of jurisdiction in the light of the law laid down by the Supreme Court in *20th Century Finance Corporation Limited v. State of Maharashtra* [2000] 119 STC 182 (SC).

10. Thereafter, the 3rd respondent issued a revised show cause notice dated 11-5-2015, enhancing the proposed tax liability. The petitioner again submitted a reply on 01-12-2015 and on 14-12-2015. The petitioner was then granted personal hearing. Thereafter, a show cause notice dated 10-02-2016 was issued proposing to levy tax at 14.5%. It was followed by an order dated 25-02-2016 confirming the proposals.

11. As against the said order dated 25-02-2016, the petitioner filed a writ petition in W.P.No.9058 of 2016. The main grievance of the petitioner in the writ petition was that the 3rd respondent failed to deal with the question of lack of jurisdiction.

12. Finding that the issue of jurisdiction was not dealt with by the 3rd respondent, this Court allowed the writ petition W.P.No.9058 of 2016 by an order dated 19-4-2016. By the said order, this Court set aside the order of assessment dated 25-02-2016 and remitted the matter back

to the 3rd respondent to consider the question of jurisdiction and to pass fresh orders.

13. Thereafter, the 3rd respondent issued another show cause notice dated 02-9-2016, to which the petitioner filed a reply. Thereafter, the 3rd respondent, by a notice dated 10-10-2016 directed the petitioner to furnish details of the signatories and witnesses to each and every one of the contracts. Those persons were also summoned by the 3rd respondent and were cross-examined by the 3rd respondent on 08-11-2016. Thereafter, the 3rd respondent passed the order dated 19-11-2016 confirming the proposal and levying value added tax to the tune of Rs.315,82,26,238/-, on the ground that there was a transfer of the right to use the rigs and that the contracts were entered into within the State of Andhra Pradesh. Therefore, the petitioner is back to square one with the above writ petition challenging the order of assessment.

14. As a matter of rule, we would not interfere with an order of assessment, as against which an effective statutory alternative remedy of appeal is available under the provisions of the A.P. VAT Act, 2005. But there are two exceptions to this rule, namely, (a) complete lack of jurisdiction and (b) violation of the principles of natural justice. Since the petitioner has assailed the impugned order on the ground of complete lack of jurisdiction, we ordered

notice to the respondents and the 3rd respondent has also filed a counter affidavit.

15. The impugned order is assailed primarily on two grounds, namely, (a) that the offshore drilling contracts were neither entered into nor executed within the State of Andhra Pradesh and hence the authorities under the A.P. VAT Act have no jurisdiction to assess such a contract to value added tax under the provisions of the A.P. VAT Act and (b) that in any case, the finding that there was a transfer of the right to use the rigs in terms of Section 4(8) of the Act was completely perverse.

16. The 3rd respondent has filed a counter affidavit contending, *inter alia*,

(i) that the petitioner has an effective statutory alternative remedy;

(ii) that since the contracts in question do not disclose the place in which they were executed and also since the petitioner failed to prove that they were not entered into in the State of Andhra Pradesh, the 3rd respondent had jurisdiction;

(iii) that merely because the non-judicial stamp papers on which the contracts were entered into, were purchased in Mumbai and merely because the witnesses to the agreement deposed in favour of the petitioner, it cannot be contended that the agreements were not executed within the State of Andhra Pradesh;

(iv) that the mere payment of service tax on an erroneous understanding of the law by the writ petitioner, cannot be conclusive proof of the fact that the effective control of the drilling rigs were not transferred to the operators, and that therefore the writ petition deserved to be dismissed.

17. We have carefully considered the above submissions.

18. From the rival contentions, it is clear that two core issues arise for consideration. They are: (i) whether the contracts entered into by the petitioner with the contractor of ONGC, could be taken to have been either entered into or executed/performed within the State of Andhra Pradesh, so as to confer jurisdiction upon the authorities under the A.P. VAT Act, 2005, to proceed against the petitioner and (ii) whether in the facts and circumstances of the case, it could be deemed that there was a transfer of the right to use the rigs.

PLACE OF EXECUTION OF CONTRACTS AND JURISDICTION:

19. Fortunately, there is no dispute on facts with respect to the terms and conditions of the contract. Accepting the contract document to be true, the 3rd respondent has come to the conclusion that the contracts should be taken to have been entered into within the State of Andhra Pradesh. Therefore, it is necessary to have a look at the relevant clauses contained in the contract document.

20. A copy of the agreement dated 16-4-2010 entered into by the petitioner shows that the contract was for charter hire of “jack up rigs”. As seen from the preamble to one of the contracts, the contracts were actually given by ONGC to a company by name Transocean Drilling Services (India) Private Limited, having registered office at Mumbai. The writ petitioner herein, which is a company registered under the laws of Cayman Islands, was named under the agreement as a sub-contractor. ***The original contract between ONGC and the contractor was for the deployment of jack up drilling rigs along with requisite personnel for operating the drilling unit and for carrying out offshore drilling operations for a term of 3 years on charter hire basis.*** Since the petitioner herein was the owner of the drilling unit and since the petitioner had adequate and necessary personnel for performing offshore drilling operations, they were entrusted with the sub-contract. One portion in the preamble to the agreement dated 16-4-2010 may be reproduced in order to understand the scope of the work entrusted to the petitioner. Hence, it is extracted as follows:

“AND WHEREAS, ONGC has issued a Firm Order to the Contractor vide No.MR/DS/MAT/CT/RIGS/CH/291 (1139)/2010/P46JC09011 dated 16.04.2010 (the “Firm Order”), wherein the Contractor is required to deploy on charter hire basis, jack-up drilling Rig, namely “J T Angel” (hereinafter referred to as “Drilling Unit”) and requisite personnel for operating the Drilling Unit and for carrying out offshore drilling operations, for a term of 3 years;

AND WHEREAS, pursuant to the Firm Order, Contractor and Operator would further execute and enter into an agreement with detailed terms and conditions (the "Contract") in terms of the 'Model Contract' in the Tender; AND WHEREAS, Sub-contractor is the owner of the said Drilling Unit and also has adequate and necessary personnel for performing the offshore drilling operations, which would inter-alia include to deploy the Drilling Unit and to provide personnel as per Annexure-III on charter hire basis, on behalf of the Contractor ("Drilling Services");

21. It is relevant to note that none of the contracting parties, namely, Transocean Drilling Services (India) Private Limited or the petitioner herein have been described in the agreement dated 16-4-2010 either to have a registered office or to have a principal office or to have a sub-office within the State of Andhra Pradesh. The non-judicial stamp paper on which the agreement was executed was admittedly purchased in the State of Maharashtra.

22. Article 27.0 of the agreement prescribes that all notices/correspondences should be delivered only at the addresses given therein. Article 27.0 reads as follows:

"27.0 WRITTEN NOTICES

All notices/correspondences shall be in writing and may be delivered personally to any Officer or Manager at the addresses specified below, unless changed by Notice or may be sent by registered mail to said address, postage prepaid, or may be sent by telex, telegram or cable, charges prepaid confirmed by copy of such telex, telegram or cable sent by registered mail to said address. The addresses referred to are:

For Contractor : Transocean Drilling Services (India)
Pvt. Ltd.

The Director

Transocean House
Lake Boulevard Road
Hiranandani Business Park
Powai
Mumbai – 400 076

For Sub-contractor: Transocean Offshore

International Ventures Limited

Registered Office :

C/o Walkers, Walkers House,
P.O.Box 265, George Town,
Grand Cayman, Cayman Islands

India Correspondence Address :

Attn. : Managing Director – IME

Transocean House
Lake Boulevard Road
Hiranandani business Park
Powai
Mumbai – 400 076”

23. Article 28 of the agreement contains a clause for arbitration. It reads as follows:

“28.0 ARBITRATION

28.1

Except as otherwise provided elsewhere in the Agreement, if any dispute, difference, question or disagreement or matter whatsoever shall, before or after completion or abandonment of work or during extended period, hereafter arises between the parties hereto or respective representative or assignees concerning with the construction, meaning, operation or effect of the Agreement or out of or relating to the Agreement or breach thereof shall be resolved by mutual consultation between the parties. If the parties fail to resolve any dispute, difference etc. by mutual consultation, then the same shall be referred to arbitration.

The reference to arbitration shall be to an arbitral consisting of three arbitrators. Each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator, who shall act as the presiding arbitrator.

The party desiring the settlement of dispute shall give notice of its intention to go in for arbitration clearly stating

all disputes to be decided by arbitral tribunal and appoint its own arbitrator and call upon the other party to appoint its own arbitrator within 30 days. If the other party fails to appoint its arbitrator within stipulated period or the two arbitrators fail to appoint the third arbitrator, Chief Justice of High Court of competent jurisdiction or Chief Justice of India as the case may be or any person or institution designated by them shall appoint the Second Arbitrator and/or the Presiding arbitrator as the case may be.

If the arbitrator or arbitrators to whom the matter is/are originally referred dies or refuse to act or resign/withdraws from the position of arbitrators for any reasons, a new arbitrator(s) shall be appointed by the respective parties/arbitrators in the manner aforesaid. The new arbitral tribunal shall be entitled to proceed with the reference from the stage at which it was left by his predecessor if both the parties consent to this effect, failing which they will be entitled to proceed de-novo.

It is a term of the Agreement that the cost of arbitration will be borne by the parties in equal shares. It is also a term of the Agreement that neither party to this Agreement shall be entitled for any ante-lite, (pre-reference) or pendent-lite interest on the amount of award.

The venue of the arbitration shall be Mumbai, India.

Subject as aforesaid, the provisions of Arbitration and Conciliation Act 1996 and any statutory modifications or re-enactments thereof and rules made thereunder for the time being in force shall apply to the arbitration proceedings under this Article.”

24. Article 29.0 of the agreement states that the agreement and all matters concerned therewith shall be governed by the laws of India, both substantive and procedural and that they shall be subject to the exclusive jurisdiction of the courts at Mumbai.

25. Therefore, it is clear from the relevant clauses contained in the agreement

(i) that one of the parties to the agreement has its registered office in Mumbai with no indication about the existence of either a principal or a sub-office in any other place in India;

(ii) that the other party to the agreement, who is the petitioner herein, is clearly indicated to be a company incorporated outside India with an address for correspondence only at Mumbai as seen from Article 27.0;

(iii) that the non-judicial stamp paper for the agreement was purchased at Mumbai;

(iv) that the arbitration clause stipulates the venue of the arbitration to be at Mumbai and

(v) that the agreement was made subject to the exclusive jurisdiction of the courts at Mumbai.

26. Therefore, if a civil dispute had arisen between the parties, only the courts in Mumbai would have had jurisdiction, not only because of Articles 27, 28 and 29 of the agreement but also because of the fact that the entire cause of action arose at Mumbai. None of the Articles of the agreement have anything to do with the State of Andhra Pradesh and hence the conclusion reached by the 3rd respondent that the agreement was not executed at Mumbai, appears to be completely perverse.

27. To come to a conclusion that a taxable event has occurred within the State of Andhra Pradesh, the Assessing Officer has followed the following reasonings, namely,

(i) that mere purchase of non-judicial stamp paper in Mumbai is not sufficient evidence to prove the execution of the agreement at Mumbai;

(ii) that the petitioner is registered as a dealer only in the State of Andhra Pradesh and not anywhere else in the country; and

(iii) that the omission to mention the place of execution of the contract in the agreement, coupled with the fact that the witnesses to the contract examined before the Assessing Officer were interested parties, is fatal to the contention of the petitioner.

28. It is true that by purchasing non-judicial stamp papers at a particular place, the parties to an agreement cannot create jurisdiction at that place. But when the purchase of non-judicial stamp papers at Mumbai is seen in the context of the location of the registered office of the Contractor at Mumbai as well as Article 27 of the agreement, indicating the addresses for correspondence of both parties to the agreement at Mumbai, the first reasoning given by the Assessing Officer can be seen to be hollow and perverse. The case on hand is not like that of two parties having their registered offices at Karnataka or Kerala, purchasing a non-judicial stamp paper at Maharashtra for the execution of an agreement. This is a case where one of the parties to the contract has its registered office at Mumbai. Both parties have indicated in Article 27 of the agreement, their addresses

for correspondence only at Mumbai. Both parties have agreed under Article 28 of the agreement to have Mumbai as the venue of arbitration to resolve any disputes and both parties have agreed to submit to the jurisdiction of the courts in Mumbai. Therefore, the first reasoning given by the Assessing Officer exhibits a complete perversity of approach.

29. Interestingly, the Assessing Officer has taken serious objections to the failure of the contracting parties to get the agreement notarised or to get it registered under the Registration Act. The Assessing Officer has not gone to the extent of holding the agreement to be inadmissible in evidence. If the Assessing Officer had come to the conclusion that the agreement was inadmissible in evidence for want of registration under the Registration Act or for want of payment of proper duty under the Stamp Act, 1899, the Assessing Officer could not have relied upon the decision of the Supreme Court in *20th Century Finance Corporation Ltd. v. State of Maharashtra* [2000] 119 STC 182 (SC). The Assessing Officer has admitted in his order that the rigs operated by the petitioner are located beyond 12 nautical miles in the Arabian Sea in the west-coast. Therefore, if the Assessing Officer has rejected the agreements as inadmissible in evidence for want of registration under the Registration Act, or for want of proper stamp duty under the Stamp Act, 1899, he could have taken only the place of location of the rigs as the criteria for determining whether the transaction is taxable in the State of

Andhra Pradesh or not. If he had done that, he could not have proceeded further, in view of the admitted position that the rigs are located beyond the jurisdiction of the taxing authorities under the State of Andhra Pradesh.

30. Therefore, by a very ingenious logic, the Assessing Officer rejected the location of the rigs as having no relevance, but at the same time found fault in paragraph 0.2 of his order that the contracts were neither notarised nor registered under the Registration Act and Stamp Act, 1899. This processing of reasoning shows that there was an element of pre-determination in the mind of the Assessing Officer.

31. The 2nd reasoning given by the Assessing Officer is that the petitioner is registered as a dealer only in the State of Andhra Pradesh and that therefore he had jurisdiction. But this logic is lopsided. A person who is a registered dealer in the State, is liable to pay tax only on the sales made by him or on the contracts executed by him within the State of Andhra Pradesh. Merely because a person is registered as a dealer in the State of Andhra Pradesh, the 3rd respondent cannot assume jurisdiction to tax all events that happen beyond the territorial limits of the State. Hence, the 2nd reasoning given by the 3rd respondent is also untenable.

32. The 3rd reasoning mentioned by the Assessing Officer is that there was a conscious omission on the part of the contracting parties to mention the place where the agreement was entered into. But we do not know how the

mere absence of the words “executed at Mumbai”, will deprive the petitioner of their right to point out how the contract was executed at Mumbai. As we have pointed out earlier,

(i) the non-judicial stamp paper was purchased at Mumbai,

(ii) the address of the registered office of one of the parties to the contract is at Mumbai, while that of the other was outside India,

(iii) the addresses for correspondence of both parties are indicated in Article 27 of the contract to be at Mumbai,

(iv) Article 28 of the agreement indicates Mumbai to be the venue of arbitration and

(v) Article 29 of the agreement indicates the courts in Mumbai to have exclusive jurisdiction to decide disputes arising out of the agreement.

33. In the light of the above facts, the Assessing Officer was completely in error and perhaps coloured in his vision when he rejected the oral evidence of the witnesses to the contract on the ground that they were interested parties. The Assessing Officer cross-examined these witnesses and it was not the 3rd respondent's finding that these persons were not witnesses to the agreement. Therefore, the 3rd reasoning given by the 3rd respondent is also completely perverse.

34. In the course of their submissions during personal hearing, the petitioner had claimed that they had paid service

tax. But the Assessing Officer claimed that there was a difference of Rs.167 Crores of service tax turnover for the year 2012-13. When the petitioner pointed out that this difference was due to variation in the Dollar exchange rate, the Assessing Officer admitted the same in point No.6 of his impugned order. But, nevertheless, the Assessing Officer concluded that erroneous payment of service tax on the entire turnover, cannot rob the legal rights of the State of Andhra Pradesh to recover the revenue legally due to it.

35. The above view is also wholly untenable. A dealer entrusted with the task of carrying out drilling operations in the west-coast on the Arabian Sea, when subjected to service tax liability by the concerned authorities, cannot be said to have wrongfully deprived the State of its revenue under the A.P. VAT Act, 2005. Therefore, all the reasons contained in the impugned order, assuming jurisdiction on the ground that the agreements should be presumed to have been entered into in the State of Andhra Pradesh, are wholly unsustainable in law and are completely perverse. Hence, the issue of jurisdiction has to be answered in favour of the writ petitioner.

TRANSFER OF RIGHT TO USE:

36. The 2nd question that arises for consideration is as to whether under the agreements in question, there was a transfer of the right to use in terms of Section 4(8) of the A.P. VAT Act, 2005.

37. An answer to this question would depend upon the nature of the contract and the mutual rights and obligations of the contracting parties. Therefore, it may be necessary again to go back to the agreement between Transocean Drilling Services (India) Pvt. Ltd., who was the contractor and the petitioner herein, who was the sub-contractor. As we have pointed out earlier, the sub-contract was for deploying on charter hire basis, a jack up drilling rig and the requisite personnel for operating the drilling unit and for carrying out offshore drilling operations. The preamble which we have extracted earlier shows that the petitioner was the owner of the drilling unit and that they also had adequate and necessary personnel for performing the offshore drilling operations that would include the deployment of drilling unit and personnel as per Annexure-III.

38. The agreement contained 5 Annexures. Annexure-I gave the Schedule of responsibilities for drilling equipment, materials, supplies and services. Annexure-II contained the scope of the work. Annexure-III contained the list of technical crew and catering crew. It appears from Annexure-III that for the purpose of operating the rigs, the petitioner has to provide the services of about 46 technical personnel including Barge Engineer, Crane Operator, Radio Operator, Chief Mechanic etc.

39. Article 3.0 of the agreement provides the roles and responsibilities of the contractor. A careful look at the same

would show that the responsibility of Transocean Drilling Services (India) Private Limited, which was the contractor, was only to liaise between the petitioner herein and the operator, namely, ONGC, to enable the sub-contractor (the petitioner herein) to carry out the work. In other words, Article 3.0 of the agreement does not impose any responsibility upon the contractor to operate the rig or extract work from the technical or other crew employed by the sub-contractor (the petitioner herein).

40. In contrast, Article 4.0 contains the roles and responsibility of the petitioner herein (sub-contractor). Under Article 4.0, the petitioner is obliged to furnish and maintain at its cost all material, supplies, equipment and services. The petitioner is also obliged to provide supervisory, technical and other personnel to properly perform the work.

41. Article 9.0 of the agreement also vests the entire responsibility for the performance of the work only upon the petitioner herein. Article 9.2 of the agreement is of significance and hence it is extracted as follows:

“9.2 REPRESENTATIVES

- (a) The actual performance and superintendence of all work hereunder shall be by Sub-contractor.
- (b) Operator through Contractor shall designate in writing representative or representatives who shall at all times have complete access to the Drilling Unit for the purpose of observing inspection or supervising the work performed by Sub-contractor in order to judge whether in Operator's opinion, Drilling Services are being conducted by Sub-contractor in compliance with the provisions of the Contract.

Operator through Contractor shall notify Sub-contractor in writing of the name(s) and authority of its representative or representatives. Such representative or representatives shall be empowered to act for Operator in all matters relating to Sub-contractor's performance of the work herein undertaken. Sub-contractor agrees at all times to cooperate with and extend assistance to employees of Operator or employees of Operator's contractors performing any function under this Agreement.

- (c) Sub-contractor shall designate an Area Manager in-charge of Sub-contractor's Drilling Unit. Sub-contractor shall notify Contractor for further notification to the Operator in writing of the name(s) and authority of its representative or representatives. Such representative or representatives shall be fully capable and empowered to act for Sub-contractor in all matters relating to Sub-contractor's performance of the work in accordance with this Agreement and the Contract."

42. From the above, it is clear that the petitioner was obliged to provide on charter hire basis (i) drilling rig and (ii) operating personnel and also take up the responsibility of carrying out the operations. Therefore, there was never any transfer of the right to use, either in favour of the contractor (Transocean Drilling Services (India) Private Limited) or in favour of the operator (ONGC).

43. It must be pointed out at this juncture that the expression "charter hire" has significance in Maritime or Admiralty Law. A charter is defined as a specific contract by which the owner of a ship lets the whole or part of the ship to another person for the conveyance of goods or passengers on

a particular voyage or until the expiration of a specified time. In simple terms, “charter party” is the mere hiring of a ship.

44. ***Under the Maritime Law, charter parties are standardised and grouped into 3 main classifications, namely, (i) voyage charters, (ii) time charters and (iii) demise or bare boat charters.***

45. In a voyage charter, the ship is hired to carry a full cargo on a single voyage. In a time charter, the ship is hired for a fixed period of time. In a demise or bare boat charter, the charterer takes over complete control of the ship for a specific purpose or period of time. ***The difference between a voyage charter and time charter on the one hand and a demise/bare boat charter on the other is that under the first two categories, the ship remains under the control of the owner, as to manning and navigation. In the case of demise or bare boat charter, the control shifts to the charterer.***

46. In the case on hand, the parties to the contract have used the expression “charter hire”, only because of the fact that they were dealing with offshore drilling rigs. Articles 3.0, 4.0 and 9.2 of the agreement make it clear that the agreement between the parties does not fall under the category of a charter similar to a demise or bare boat charter. The terms of the agreement makes it clear that the entire control with regard to manning, operating and navigating was retained by

the petitioner herein. Once this is clear, it follows as a corollary that there was no transfer of the right to use.

47. As pointed out by the Supreme Court in *State of A.P. v. Rashtriya Ispat Nigam Ltd.*¹, hire charges are taxable only when full possession and control is given to the hirer. If the owner retains effective control over the equipment, it is not transfer of the right to use.

48. As pointed out by the Supreme Court in *BSNL v. Union of India*², the following attributes should be satisfied before a transaction is construed to be one involving transfer of the right to use the goods:

- (i) the availability of goods for delivery,
- (ii) *consensus ad idem* as to the identity of the goods,
- (iii) a legal right for the transferee not only to use the goods but also to bear all legal consequences of such use, namely, the obtaining of permissions or licences etc.,
- (iv) the availability of the right to the transferee to the exclusion of the transferor and
- (v) the restriction for the owner to transfer the same rights to others during the period for which the right is so transferred.

49. But the above tests are not exhaustive. As we have mentioned earlier, the equipment and technical personnel provided by the petitioner to the main contractor are on

¹ (2002) 3 SCC 314

² (2006) 3 SCC 1

charter hire, where the complete control was retained by the petitioner. All responsibilities were placed only upon the petitioner by the main contractor himself. Therefore, even the tests adopted by the Delhi High Court in two successive decisions, one in *Commissioner, VAT v. International Travel House Ltd.*³ and *Hari Durga Travels v. Commissioner of Trade*⁴, are satisfied in this case.

50. Hence, the petitioner is entitled to succeed on both counts, namely, (i) lack of jurisdiction on the part of the 3rd respondent and (ii) the absence of a transfer of the right to use. Therefore, the writ petition is allowed and the impugned is set aside. The miscellaneous petitions, if any, pending in this writ petition shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

J.UMA DEVI, J.

06th April, 2017.
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Note:-
L.R. Copy to be marked.
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³ [2009] 25 VST 653

⁴ [2015] 51 GST 582

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

Writ Petition No.44908 of 2016
(per VRS, J.)



06th April, 2017.
(Ak)